BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SALLIE V. BELL	)	
Claimant	)	
	)	
VS.	)	
	)	
INTEGRATED HEALTH SERVICES	)	
Respondent	)	Docket No. 1,005,394
	)	
AND	)	
	)	
PACIFIC EMPLOYERS INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the October 11, 2004 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on March 15, 2005, in Wichita, Kansas.

APPEARANCES

Chris A. Clements, of Wichita, Kansas, appeared for the claimant. Richard J. Liby, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument neither party disputed the ALJ's conclusion that claimant sustained a task loss of 55 percent as a result of her November 5, 2001 accident.

ISSUES

The ALJ awarded claimant a 48.5 percent work disability based upon a 55 percent task loss and a 42 percent wage loss as a result of her November 5, 2001 accident. The ALJ agreed with respondent that, unless permanently and totally disabled for purposes of workers compensation, claimant's present receipt of Social Security Disability benefits does not excuse her from the obligation of making a good faith effort to return to gainful employment as contemplated by the Workers Compensation Act. Thus, because claimant has failed to make any effort to obtain work since leaving respondent's employ, the ALJ

imputed a post-injury wage of $291.20 per week which translates to the 42 percent wage loss utilized in the work disability computation.

Contrary to the arguments advanced by respondent, the ALJ found claimant's average weekly wage to be $495.76 based upon a stipulated base wage of $10.33 per hour for a 40 hour work week and $49.82 in fringe benefits.[1] The ALJ also denied respondent's request for a credit under K.S.A. 44-501(c), finding that the preexisting impairment opinion was not "rendered pursuant to the Fourth Edition [of the *Guides* (American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*)], which is a statutory requirement."[2]

The respondent requests review of the ALJ's findings with respect to average weekly wage, the nature and extent of claimant's impairment and entitlement to work disability (in particular the wage loss portion of the computation) and review of the ALJ's denial of any preexisting credit under K.S.A. 44-501(c). Respondent believes that claimant was regularly expected to work approximately 35 hours per week, rather than the 40 used by the ALJ, and that her shift differential pay for the relevant time period totals $35.05 per week. When totaled, respondent believes claimant's correct average weekly wage should be $430.92. Alternatively, respondent argues that the ALJ's method of calculating the average weekly wage essentially counted some of the claimant's hours twice, thus overinflating her pre-injury wage. To the extent claimant was paid overtime or a shift differential, respondent maintains she is only entitled to the additional hourly premium.

Respondent also challenges the ALJ's finding with respect to claimant's 42 percent wage loss. Respondent asserts that claimant retains the ability to obtain employment and earn $404 per week as a telemarketer. This imputed wage represents, in respondent's view, 94 percent of her pre-injury wage so her recovery would be limited to her functional impairment.[3] In the alternative, respondent argues that even at the higher pre-injury wage, claimant's work disability is, at best, 35 percent based upon a 15 percent wage loss and a 55 percent task loss.

Finally, respondent alleges the ALJ erred in failing to grant a 10 percent credit for claimant's preexisting impairment under K.S.A. 44-501(c).

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[1] These figures yield the sum $463.02 rather than the figure reflected in the Award. Either the ALJ miscalculated or she adopted the figures and method of calculation advanced by claimant as this is the figure advocated by claimant in her submission brief to the ALJ.

[2] ALJ Award (Oct. 11, 2004) at 4-5.

[3] The ALJ did not make any finding with respect to claimant's functional impairment and the parties could not stipulate to such a percentage, nor did they request the Board make such a finding.

Claimant urges the Board to affirm the ALJ's Award in all respects. At oral argument claimant's counsel suggested that under these facts and circumstances, claimant should be excused from the legal obligation to demonstrate a good faith effort to search for appropriate employment as required by *Foulk*[4] and *Copeland.*[5] According to her counsel, claimant suffers from a number of other physical limitations in addition to those that arose as a result of her November 5, 2001 injury. As a result, she is presently on Social Security Disability and has made no effort to find alternative employment since leaving respondent's employ. He maintains that under these facts, the ALJ should not have imputed a wage to her. Instead, her work disability computation should have included a 100 percent wage loss rather than the lower figure used by the ALJ.

The issues to be decided are as follows:

1. Claimant's average weekly wage;

2. The nature and extent of claimant's impairment, specifically the wage loss component of her work disability; and

3. Whether respondent is entitled to a credit for claimant's preexisting impairment under K.S.A. 44-501(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is a 60 year old female who worked for respondent for approximately seven years as a CNA. According to claimant, she was hired to work 40 hours per week and unless she was sick, routinely worked 40 hours per week. However, when questioned about her schedule, claimant testified that she was working from 10 p.m. to 6 a.m. each week, with 30 minutes off for lunch.

The parties stipulated to the admissibility of pay records which only serve to further cloud the issue of claimant's average weekly wage. The parties agree claimant's base hourly wage was $10.33 per hour. In addition, claimant testified she would receive overtime for anything over 40 hours each week as well as a shift differential of $.75 to $1.00 per hour. Neither party contests the validity of the other's documentary evidence on

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

this issue. They merely choose to rely upon their respective documents as a means of maximizing or minimizing the average weekly wage.

The records produced by the parties include two separate wage statements. One of these documents is broken down by week (for a 26 week period) and reflects hours at base wage, overtime and shift differential. The other wage statement omits any reference to hours and reflects payments made every other week (for the same 26 week period) and only shows the amounts apparently earned. The figures contained on both of these documents are not entirely consistent with each other. Independent of their inconsistency, neither of these documents show that claimant regularly worked either 40 hours per week or 80 hours every two weeks.

In addition to the documents produced by respondent, claimant offered a number of direct deposit receipts that are somewhat easier to understand, but are not wholly consistent with either of the respondent's wage statements. The deposit receipts cover the period of time from March 30, 2001 to September 28, 2001. Taken as a whole, these receipts show that claimant worked, on average, 80 hours per pay period and received a 30 cent premium differential (during at least one pay period) as well as some overtime in the 26 weeks before her accident. Claimant maintains this evidence justifies an average weekly wage calculated as follows:

$413.20 Base wage ($10.33 x 40)
$ 26.10 Overtime (678.49 ÷ 26)[6]
$ 6.64 Base Premium ($172.74 ÷ 26)
$ 49.82 Fringe Benefits
$495.76

Respondent argues that even though claimant was a full-time worker, she was not regularly expected to work 40 hours. Rather, 30 hours per week was considered full-time for purposes of entitlement to fringe benefits, vacation and sick leave. Respondent maintains claimant's average hourly rate varied depending on her shift and that the wage statement it offered "is the best evidence of claimant's average weekly wage".

Respondent's counsel goes on to explain that its records show that claimant's average weekly number of base pay hours for the 24 week period before her accident was 33.5, which at the base wage of $10.33 is $346.05. That figure should then be added to the average shift differential pay in that same 26 week period, which is $35.05, and the

[6] There is no apparent dispute that claimant did not work for 2 weeks of the relative 26 week period. Thus, any average weekly wage computation should be done utilizing the 24 week period rather than 26 weeks. *Abrams v. Conroy Contractor, Inc.*, No. 150, 733, 1996 WL 582634 (Kan. WCAB Sept. 20, 1996). Claimant acknowledged this miscalculation error at oral argument. As a result, the wage claimant believes she was earning increases slightly.

result is $381.10. The value of fringe benefits is then added ($49.82) and the result is $430.92.

Respondent alternatively argues that if a 40 hour work week is utilized, then the average weekly wage must be calculated in such a fashion so as to avoid duplication of the base wage. In other words, for those weeks that claimant did not *actually* work a 40 hour work week, she should not get the benefits of an imputed 40 hour work week *and* time and a half. Rather, respondent suggests only the actual difference between the base wage and the overtime rate should be used to calculate the average weekly wage. Thus, because there are 54.28 hours of overtime on the wage statement, these hours should be multiplied by $5.17 per hour (the difference between the $15.50 overtime rate and her base rate of $10.33) rather than the $15.50 rate. In respondent's view, this avoids a unwarranted duplication of her wage rate.

During her tenure in respondent's employ, claimant sustained two accidents: one in 1999, which involved an injury to her neck and the second in 2001, which is the subject of this claim. For the 2001 claim, claimant underwent a cervical fusion at the C6-7 vertebrae, performed by Dr. Jacob Amrani. Dr. Amrani eventually rated claimant at 10 percent impairment to the body as a whole and ultimately released her to return to work ultimately without any restrictions. She returned to work for respondent in her regular position, and testified that she was able to do all her normal work duties with no pain or need for restrictions.

On November 5, 2001, claimant was again injured while lifting a patient who struggled and grabbed her right arm. She was initially treated by Dr. Paul Stein for her neck complaints and later with Dr. James L. Gluck for the right shoulder problems. When conservative methods failed to relieve the shoulder complaints, Dr. Gluck performed an arthroscopic procedure in May 2002 to repair what was apparently a torn rotator cuff. On August 23, 2002, Dr. Gluck released claimant, finding her to be at maximum medical improvement.

Unfortunately, claimant was not able to return to work as respondent could not accommodate her lifting restrictions.

In March or April 2003, claimant began experiencing numbness in her left arm and left leg. She went to the emergency room where the doctors initially thought she might be having a stroke. When that possibility was eliminated, she was ultimately diagnosed with a herniation in her neck at C5-6, the level just above her earlier fusion. On April 7, 2003, Dr. Amrani performed surgery, removing the old hardware, fusing the C5-6 vertebrae and installing new hardware.

Although some of her symptoms have resolved, claimant continues to walk with a cane and experiences pain in her neck and right shoulder. Her left foot drags when she walks and she is unable to climb stairs in a normal fashion. Claimant applied for and has

been granted Social Security Disability benefits based upon her diabetes, high blood pressure, as well as her neck and shoulder problems. Claimant is presently not looking for work, nor has she made any such efforts since leaving her job with respondent.

At the request of her attorney, Dr. C. Reiff Brown evaluated claimant on December 9, 2002. During this visit, her complaints included shoulder discomfort both anterior and superior, a limitation of movement of the right shoulder and weakness. She also complained of pain with movement of her neck and of a limitation of movement. Dr. Brown acknowledged that claimant gave the history of having a previous disc surgery with a fusion and having total relief of all neck symptoms as a result.

Dr. Brown assigned a 5 percent permanent partial impairment of function of the whole body on the basis of aggravation of her pre-existing degenerative disease in the cervical area, a 7 percent impairment to the upper extremity for loss of range of motion of the right shoulder, and a 6 percent impairment of the right upper extremity on the basis of crepitus on movement of the shoulder joint. As of December 2002, Dr. Brown's impairment rating attributable to the November 2001 accident was, when converted and combined, 13 percent permanent partial impairment to the body as a whole.[7]

As of that first evaluation, Dr. Brown recommended claimant avoid rotation, flexion and extension of the cervical spine more than 30 degrees and should avoid situations which might cause jerking injuries and produce additional sprain to the cervical area. Claimant was to avoid work that involved frequent reaching beyond 18 inches with the right hand and use of the right hand above shoulder level. Lifting should be limited to 30 pounds occasionally, 15 pounds frequently, utilizing both hands, lifting between the waist and shoulder level with the right hand should be limited to 10 pounds occasionally, 5 pounds frequently and lifting should not be done above chest or shoulder level. He indicated that with the restrictions he imposed, claimant would not be able to do the work of a CNA.[8]

Dr. Brown reevaluated claimant on January 13, 2004. He noted claimant's subsequent medical treatment required an emergency room and eventually decompression surgery by Dr. Amrani. He further noted that she experienced some pain improvement in her neck and shoulder, but that she still has pain and must use a cane because she walks with a limp.

Following this evaluation, Dr. Brown assigned a 34 percent permanent partial impairment of function of the body as a whole as a result of the injury. When broken down, Dr. Brown explained that 8 percent of this rating is due to loss of motion of the right

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[7] Brown Depo. at 11.

[8] *Id.* at 12, Ex. 1 at 1-2.

shoulder as well as crepitus, while 15 percent impairment of the whole body was assigned on the basis of claimant's placement in the DRE Cervicothoracic Category III and another 15 percent impairment to the whole body is based on her limping gait.[9] He increased restrictions limiting her to only those work activities that would allow her to sit, stand, and walk short distances about the room. She is to avoid long flights of stairs and work that requires frequent squatting. Lifting and carrying should be limited to 20 pounds occasionally, 10 pounds frequently, she should avoid work that involves frequent rotation and extension of the cervical spine more than 30 degrees and work that involves use of the right hand above shoulder level or for reach away from the body more than 18 inches.[10]

At respondent's request, Dr. Philip R. Mills saw claimant on July 22, 2004 for a medical examination and evaluation. After his examination, Dr. Mills diagnosed a "remote herniated nucleus pulposus at C6-7 with anterior discectomy/fusion at C6-7 and left iliac crest bone graft with plate and screws, secondary to an injury in 1999; central canal stenosis, lateral recess C4-5, C5-6 and C6-7",[11] which he believed appeared to be the natural and probable course of claimant's degenerative arthritis. He also diagnosed right shoulder impingement syndrome; right shoulder calcific tendinitis; large humeral head chondral defect with chondral loose bodies, status post right shoulder arthroscopy and repair. He indicated that both the right shoulder impingement and cervical sprain were, in his opinion aggravated by the November 5, 2001 incident.[12]

Dr. Mills concluded that claimant had reached maximum medical improvement. He provided a rating, pursuant to the Fourth edition of the AMA *Guides*[13] of 6 percent permanent partial impairment to the right upper extremity secondary to loss of range of motion, and a 10 percent permanent partial impairment for acromioplasty. When properly combined, this yields a 15 percent impairment to the right upper extremity and when converted, a 9 percent to the body as a whole permanent partial impairment. Dr. Mills also assigned a 5 percent impairment to the whole body for claimant's cervical complaints. When properly combined, these ratings total 14 percent impairment to the body as a whole. In apparent acknowledgment of Dr. Brown's higher impairment rating, Dr. Mills suggested that claimant has improved since she was seen by Dr. Brown.

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[9] *Id.* at 18.

[10] *Id.*, Ex. 2 at 2.

[11] Mills. Depo. at 4.

[12] *Id.* at 5.

[13] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

Dr. Mills restricted claimant from activities involving prolonged or repetitious cervical hyperextension, and instructed her to avoid work above the shoulder level, and to not work more than 18 inches from the body. He further testified that the restrictions relating to the cervical area are attributable to the 1999 accident, while the limitation to her shoulder is owing to the 2001 accident which is the focus of this claim.

Dan Zumalt, a vocational specialist, concluded that claimant retained the capacity to earn $404.40 a week. Based upon her restrictions and her limited educational background (she quit school after 8th grade), he concluded she was qualified to perform the job of telemarketer. In fact, this was the only job Mr. Zumalt could identify that claimant was qualified to do and within her restrictions, although he conceded that some of the telemarketing jobs required a high school diploma, something claimant does not have. He further testified that the job of telemarketer carries with it an average weekly wage of $8.30 to $8.80 per hour. This wage figure is based upon an average of salaries earned by those actually performing the work and responding to the 2003 Kansas Wage Survey and, therefore, included wages of workers who were not entry level. According to Dr. Mills, claimant is able to perform the job of telemarketer, but not without some concerns. He testified that the positioning of the computer monitor was key to her ability to do that job.

In contrast to Mr. Zumalt's opinions are those offered by Jerry Hardin, another vocational specialist, retained by claimant. In his February 11, 2004 report, Mr. Hardin suggested that claimant retained the ability to earn $240 per week. He did not, however, provide any explanation as to what sort of job he envisioned claimant could perform. All that can be said is he believed claimant could earn $6.00 per hour, working 40 hours per week.

The only physician to speak to the issue of claimant's preexisting impairment was Dr. Brown who testified that given claimant's previous fusion, he "would have expected a five percent impairment based on the DRE Cervicothoracic Category II, unless she had some neurologic symptoms left over that would have added another five percent."[14] Respondent did offer, without objection, the transcript and attachments to the claimant's settlement of her earlier workers compensation claim. This includes a rating report from Dr. Amrani dated October 21, 1999 and it indicates "[a]ccording to the AMA Guidelines she has a 10% impairment rating."[15]

The ALJ's Award first addressed the dispute surrounding claimant's average weekly wage. Without any explanation, she concluded claimant's average weekly wage was $495.76 based upon the stipulated base wage of $10.33 for 40 hours per week and

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[14] Brown Depo. at 22-23. Although he does not explicitly so state, the reference to DRE categories makes it implicit that Dr. Brown is utilizing the 4th Edition of the *Guides* as that methodology is employed therein and was not utilized in earlier editions.

[15] R.H. Trans., Resp. Ex 1 at 7.

discontinued fringe benefits of $49.82 per week. The Board finds this factual finding should be modified.

While the parties agree claimant's base hourly rate was $10.33, the regular number of hours per week is in dispute. K.S.A. 44-511(b)(5) provides that the average gross weekly wage shall be the gross amount of money earned during the weeks employed immediately preceding the date of accident, divided by the number of weeks employed. The Board has also held that if the claimant does not work during any given number of weeks during the relative 26 week period, those weeks should be excluded.[16] Thus, because claimant worked 24 of the 26 weeks before her injury, the Board will use 24 as the denominator for purposes of calculating her wage.

Here, the documents provided by the parties are in conflict. Claimant testified she worked 40 hours per week and most of the pay receipts she produced confirm that. Respondent's wage statements, however, do not comport with claimant's testimony or even the actual pay receipts. This inconsistency is unexplained and as a result the Board is left to sift through the documents to fashion what it believes is the most credible explanation as to claimant's average weekly wage.

Having done so, the Board finds claimant regularly worked 40 hours per week for the relevant time period before her accident. While the respondent's wage statements do not bear this out, claimant's pay receipts do and the Board finds those documents, coupled with claimant's testimony, are the most persuasive evidence on this issue. Thus, claimant's base average weekly wage is $413.20.

K.S.A. 44-511(b)(4)(B)(iii) dictates the method used to compute overtime. It indicates average weekly overtime "shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks. . .". Here, the number of hours of overtime in the 26 week period before her accident, as shown by claimant's pay receipts, was 44.03.[17] When her 2 week absence is excluded, the average weekly overtime hours was 1.83. At the overtime rate of $5.17 per hour (the excess over her base rate thus avoiding duplicating the base wage) the average weekly overtime amount should be $9.46 per week.

As for the shift differential, the Board finds precious little upon which to base a conclusion. Claimant's last pay receipt does have a notation for 16.25 hours paid at a

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[16] *Abrams v. Joe Conroy Contractor, Inc.*, No. 150,733, 1996 WL 582634 (Kan. WCAB Sept. 20, 1996).

[17] This figure comes from the year-to-date totals contained on the receipts and reflects the hours of overtime between the March 30, 2001 and the September 28, 2001 pay periods.

differential pay rate. It shows for those 16.25 hours she was paid an additional $.30 per hour, but this is the only pay receipt that includes that notation. The rest of her pay receipts reference only base pay and overtime hours. Because there is nothing else upon which the Board can reasonably rely, this hourly pay differential will be averaged over the 24 week period as well and added to the average weekly wage. This increases claimant's average weekly wage by 20 cents (16.25 hours divided by 24 weeks and multiplied times the differential pay rate of .30.

Thus, the Board finds the claimant's average weekly wage is as follows:

$413.20 weekly base wage
$ .20 weekly shift premium
$ 9.46 weekly overtime
$ 49.82 fringe benefits
$472.68

The ALJ's Award is hereby modified to reflect this new figure.

When, as here, an employee's injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

This statute must be read in light of *Foulk*[18] and *Copeland*.[19] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[20]

The claimant does not dispute that she has not actively searched for employment since 2002. She maintains she is unable to work as evidenced by her receipt of Social Security disability payments, and that under these facts and circumstances, she should not be compelled to search for work.

The ALJ concluded that receipt of such benefits does not excuse her from the obligation to make a good faith effort to return to gainful employment. The Board agrees. The determinations made by the Social Security Administration are based on different criteria and are not binding upon this body. The ALJ correctly determined that a post-injury wage must be imputed to claimant for purposes of computing her work disability under K.S.A. 44-510e(a).

The vocational experts testified claimant could make anywhere from $6.00 to $8.55 an hour. This higher paying job was as a telemarketer and is the only job that was identified by the vocational experts as one that claimant was qualified to perform. After considering the evidence, the Board finds that the ALJ imputed an appropriate wage to claimant. Thus, the imputed weekly wage of $291.00, which is an average of the two vocational experts' opinions, was appropriate.

Based upon a pre-injury average weekly wage of $472.68, the $291.00 post-injury wage means claimant has a 39 percent wage loss. When the 39 percent wage loss is averaged with the uncontested 55 percent task loss, the result is 47 percent. The ALJ's Award is modified to reflect a work disability of 47 percent.

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[18] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[19] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[20] *Id.* at 320.

The ALJ denied respondent's request for a credit for claimant's preexisting impairment as she found that the opinion offered by respondent was not sufficient under the statute. She concluded that Dr. Amrani's opinion, while indicating claimant had a preexisting impairment, was not rendered pursuant to the Fourth Edition of the *Guides*, which is a statutory requirement.[21]

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[22]

The Board has interpreted the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions, but it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling or ratable under the AMA *Guides*[23] cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician should use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

Here, Dr. Amrani did not testify. Nor is there any evidence that the only physician who even spoke to the issue of preexisting condition, Dr. Brown, had reviewed all of claimant's contemporaneous records generated during the course of claimant's treatment following her 1999 accident. Respondent urges the Board to accept the rather cryptic rating report, which only references "AMA Guidelines" and obviously does not indicate which edition of the *Guides*.

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[21] ALJ Award (Oct. 11, 2004) at 5.

[22] K.S.A. 44-501(c).

[23] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

The Board finds the respondent has, by the barest of margins, met its evidentiary burden on the issue of preexisting condition. Dr. Brown testified that he would have expected that an individual who had undergone a fusion, such as this claimant, would be left with a 5 percent impairment under the DRE methodology. The Board notes the utilization of the DRE's is a methodology new to the 4th Edition of the *Guides*. Thus, the obvious implication is that Dr. Brown was using the most recent edition of the *Guides* as required by the Act. Since there is no dispute that claimant had fusion surgery before her November 5, 2001 injury and that, at a minimum, 5 percent would be assigned to such a diagnosis, the Board finds that the ALJ's denial of credit under K.S.A. 44-501(c) should be reversed. The Board hereby finds that respondent is entitled to 5 percent credit against the 47 percent work disability. Thus, claimant is entitled to an award for a 42 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated October 11, 2004, is affirmed in part and modified in part as follows:

The claimant is entitled to 27.43 weeks of temporary total disability compensation at the rate of $319.82 per week or $8,772.66 followed by 169.08 weeks of permanent partial disability compensation at the rate of $319.82 per week or $54,075.17 for a 42 percent work disability, making a total award of $62,847.83.

As of March 24, 2005 there would be due and owing to the claimant 27.43 weeks of temporary total disability compensation at the rate of $319.82 per week in the sum of $8,772.66 plus 149 weeks of permanent partial disability compensation at the rate of $319.82 per week in the sum of $47,653.18 for a total due and owing of $56,425.84, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $6,421.99 shall be paid at the rate of $319.82 per week for 20.08 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of March, 2005.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director